

REMARKS

I. STATUS OF THE CLAIMS

Claims 1-24 are pending, of which claims 1, 12, 13, 19, and 20 are independent.

II. NONOBVIOUSNESS OVER THE CITED REFERENCES

The Office has maintained the obviousness rejections over US 5,444,091 ("Rapaport") combined with other references, including Frei et al., International J. of Cosmetic Science 20, 159-173 (1998) ("Frei") and DE04244418 ("Quelle").

Applicants respectfully traverse, in view of the Declaration Under 37 C.F.R. § 1.132 executed by inventor Philippe Msika ("the Declaration"). The Declaration provided testimony that:

1. a person of ordinary skill in the art would not conclude from Rapaport that stretchmarks are treated by promoting the rigidity and elasticity of the skin;
2. a person of ordinary skill in the art reading Frei and Rapaport would not conclude that a soya peptide would be effective for treating stretchmarks;
3. the etiologies of skin ageing and stretchmarks differ greatly; and
4. a product that stimulates collagen synthesis and elasticity of the skin is not sufficient to prevent or treat stretchmarks.

A. Rapaport and Frei

The Office rejected claims 1-6, 8-10, and 21-22 as obvious over Rapaport and Frei.

The Office conceded that Rapaport fails to teach a soya peptide. Office Action, page 3, lines 7-9.

To remedy this deficiency, the Office applied Frei, which according to the rejection, teaches that "soya peptide . . . increases skin firmness, elasticity, and tone." The Office alleges that it would have been obvious "to modify the composition of Rapaport by

incorporating soya peptide" because Rapaport "teaches that stretchmarks are treated by . . . promot[ing] the rigidity and elasticity of the skin" and "Frei teaches that soya protein stimulates collagen formation and elastin synthesis, thereby improving firmness and elasticity of skin" such that a "skilled artisan would have had a reasonable expectation of successfully improving the method of treating stretchmarks". Office Action, page 3, lines 1-9 from bottom.

Responding to point 1 of the Declaration ("a person of ordinary skill in the art would not conclude from Rapaport that stretchmarks are treated by promoting the rigidity and elasticity of the skin"), the Office stated that Rapaport's disclosure "should be considered objective teachings made available to one of ordinary skill in the art" and "whether a routineer would have doubted the publication is a subjective matter". Office Action, page 8.

The Office must make factual findings supported by substantial evidence. In particular, "there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. __, 82 U.S.P.Q.2d 1385, 1391 (2007).

Here, the Office has not met its burden to clearly articulate, in view of the Declaration testimony, why a person of ordinary skill in the art would have a "reasonable expectation of success" in combining Rapaport with Frei.

The Declaration states:

5. In my opinion, a person of ordinary skill in the art would not conclude from Rapaport that stretchmarks are treated by promoting the rigidity and elasticity of the skin. Rapaport speculates that alpha hydroxy acids reduce stretch marks by (i) eliciting a hyperplastic response in the epidermis and dermis that counters the breakdown of collagen, or (ii) by stimulating the production of interfibrillary material such as glycosaminoglycans which promotes both rigidity and elasticity to the skin. See Rapaport column 4, lines 31-38. Rapaport contains no test data supporting these assertions. These proposed mechanisms in Rapaport for enhancing skin elasticity and rigidity are unsupported. Consequently, a person of

ordinary skill in the art would consider these mechanisms to be speculative and unproven.

Consequently, the Office erred in mischaracterizing Rapaport as disclosing that stretchmarks are treated by promoting the rigidity and elasticity of the skin. The Office erroneously relied on Rapaport's speculation as basis for asserting obviousness.

Responding to point 2 of the Declaration ("a person of ordinary skill in the art reading Frei and Rapaport would not conclude that a soya peptide would be effective for treating stretchmarks"), the Office stated that "the declarant's opinion that a skilled artisan would not have found motivation to make the present invention in view of the Frei disclosure is also viewed subjective" (Office Action, page 8, last 3 lines).

To the contrary, the Declaration provides objective testimony based on Frei's own statements expressing doubt. Regarding Frei, the Declaration states:

6. Frei provides no basis to infer that soya peptide increases skin firmness, elasticity, and tone. Frei does not directly state that soya peptide increases skin firmness, elasticity, and tone. Frei describes a skin equivalent (SE) model, but Frei lacks any objective measurement of skin firmness, elasticity, and tone. Frei states "the application of soya peptide ... might ... delay the in vitro process of aging." Frei, p. 171, 3d full para., last sentence (emphasis added). Frei further states "[t]his peptide is able to stimulate regeneration of metabolic activity, which may help the skin to look younger," Frei, p. 171, 4th full para., last sentence (emphasis added). The use of "might" and "may" in the sentences quoted above indicates that the authors were uncertain of these assertions.

7. Frei is equivocal about soya peptide's effect on ageing and recognizes that no definite conclusion is possible. Frei states "no conclusion could be drawn concerning the way the soya peptide acts in this SE model." Frei, p. 171, first full paragraph, final sentence. In my opinion, a person of ordinary skill in the art reading Frei would not conclude that soya peptide increases skin firmness, elasticity, and tone.

The following passage from Frei reveals why a person of ordinary skill in the art would consider Frei's conclusions to be speculative:

After 25 days of culture, the reconstituted epidermis showed some signs of ageing such as a reduction in the number of keratinocyte layers and a flatness of the basal membrane. However, after 15 days of soya peptide treatment, SEs present an epidermis which is morphologically closer to normal human skin than to control SEs. Keratinocyte renewal and differentiation has been strengthened by the application of soya peptide which might also delay the *in vitro* process of ageing.

On a study model which reproduces the environment in which dermal fibroblasts and keratinocytes develop *in vivo*, the significant stimulating effect of a soya peptide on extracellular matrix component synthesis and its action on epidermal differentiation have been shown clearly. This peptide is able to stimulate regeneration of metabolic activity, which may help the skin to look younger.

Frei, p. 171, 3d-4th paras. If "the application of soya peptide ... might ... delay the *in vitro* process of aging," Frei, p. 171, 3d full para., last sentence (emphasis added), then the very same application **might not**. Similarly, if "[t]his peptide is able to stimulate regeneration of metabolic activity, which **may** help the skin to look younger," Frei, p. 171, 4th full para., last sentence (emphasis added), then again, it **may not**. As a result, the evidence and explanation fail to support that "soya peptide ... increase[es] skin firmness, elasticity, and tone."

Additionally, according to Frei, "no conclusion could be drawn concerning the way the soya peptide acts in this SE model."

Although a significant protective effect of the epidermis in this SE model has been demonstrated in another study [25], because of its low molecular weight, the tested soya peptide may cross the epidermal barrier (*ex vivo* percutaneous absorption study and *in vivo* study, N. Abdul Malak and E. Perrier, unpublished paper). In addition no conclusion could also be drawn concerning the way the soya peptide acts in this SE model.

Frei, p. 171, last sentence first full paragraph.

The Office erred by failing to properly weigh this Declaration testimony providing strong evidence of nonobviousness over the art of record. Consequently, the rejection over Rapaport and Frei should be withdrawn.

B. Rapaport, Frei, and Andary/Flick

The references Andary and Flick do not cure the deficiencies of the combination of Rapaport and Frei.

Claim 7 is rejected as obvious over Rapaport and Frei further in view of US 5,719,129 ("Andary"). Claim 7 depends on claim 1, and incorporates all the limitations of this base claim. As explained above, claim 1 is patentable over Rapaport and Frei. Thus, the reasons mentioned above for claim 1, are also applicable here for claim 7. Furthermore, Andary does

not remedy the deficiencies of either Rapaport or Frei alone or in combination. Thus, the three references in combination fail to render obvious claim 7.

Claim 11 was rejected as obvious over Rapaport and Frei further in view of Flick, Cosmetic And Toiletry Formulations 1995. Flick was asserted solely for its disclosure of pH of the composition, and cannot remedy the deficiencies of Rapaport and Frei. Thus, this rejection should be withdrawn for the same reasons that the rejection over Rapaport in view of Frei should be withdrawn.

C. Rapaport and Quelle, alone or with Flick/Frei

The Office rejected claims 12-17 and 23-24 as obvious over Rapaport in view of Quelle.

The Office concedes that Rapaport fails to teach tripeptide consisting of the amino acids glycine, histidine, and lysine. Office Action, page 5.

To remedy these deficiencies, the Office applied Quelle, for its alleged disclosure that the “tripeptide Gly-His-Lys [is used] in cosmetic compositions to treat ageing skin and as radical scavenger (antioxidant).” Office Action, page 5.

This rejection is respectfully traversed, because it appears that the Office failed to consider the Declaration testimony on this issue, specifically points 3 and 4 of the Declaration (“the etiologies of skin ageing and striae distensae differ greatly” and “a product that stimulates collagen synthesis and elasticity of the skin is not sufficient to prevent or treat stretchmarks”). The Declaration states:

1. Rapaport and Frei relate to nonanalogous fields.
Rapaport relates to treating striae distensae, while Frei relates to treating ageing skin (see respective Abstracts). Skin ageing and striae distensae have different etiologies. The physicochemical attributes of ageing skin are different from those for stretchmarks. For that reason, a person of ordinary skill in the art would not conclude that a formulation that is effective for treating the effects of ageing in skin would also be effective in treating stretchmarks (striae distensae).

2. Frei is not reasonably pertinent to the problem that Rapaport seeks to solve. Generally, the problems relating to ageing skin are not the same as the problems reflected in stretchmarks or striae distensae.

3. A person of ordinary skill in the art reading Frei and Rapaport would not conclude that a soya peptide would be effective for treating stretchmarks. Rapaport relates to treating lesions of striae distensae. See Abstract. Frei relates to treating skin ageing and states in the Abstract, "In this model, the soya peptide increased the thickness of the epidermis." While that effect may support anti-ageing properties, a person of ordinary skill in the art would not recognize effectiveness for treating stretchmarks.

The above Declaration testimony directly counters the Office's erroneous attempt to relate skin aging to the treating of stretchmarks. Thus, the rejection is improper and should be withdrawn.

Claims 14-17 and 23, 24 depend on claims 12 or 13 and incorporate all their limitations. The dependent claims are therefore patentable for at least the same reasons mentioned above for claims 12 and 13.

Claim 18 was rejected as obvious over Rapaport, Quelle, and Flick. The rejection should be withdrawn, because claims 18 depends from patentable claim 13, which is allowable for the reasons stated above.

Claims 19 and 20 are rejected as obvious over Rapaport, Quelle, and Frei. The rejection should be withdrawn for the reasons noted above. For example, Rapaport does not teach soya peptide composition for treating stretchmarks. The Office erroneously relied on Frei to remedy this deficiency. Furthermore, the Office erroneously relied on Quelle to teach a tripeptide for treating or reducing the formation of stretchmarks.

CONCLUSION

Applicant believes that the present application is now in condition for allowance.
Favorable reconsideration of the application as amended is respectfully requested.

The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application. The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 19-0741. Should no proper payment be enclosed herewith, as by a check being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing or a credit card payment form being unsigned, providing incorrect information resulting in a rejected credit card transaction, or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741.

If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicant hereby petitions for such extension under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 19-0741.

Respectfully submitted,

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